88-1091

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EVANNA POWELL,
Petitioner

versus

ANTHONY NIGRO, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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529-2773

49pp

QUESTIONS PRESENTED

I

Whether the Court of Appeals erred, when it denied the petition for rehearing of the petitioner's Motion for Summary Reversal of, the underlying Motion for Summary Judgment, in light of Watson v. Ft. Worth, __ U.S. __, (6-29-88)(No. 86-6139) which requires, in cases alleging disparate impact, as herein alleged, that after the plaintiff has made a prima facie case, the opposing party come forth with evidence, stating why the actions complained of, were not discriminatory?

Whether the Court of Appeals erred, when it denied the petition for rehearing of the petitioner's Motion for Summary Reversal of, the underlying Motion for Summary Judgment, in this case, where it did not require the

defendants to come forth with either "clear and convincing evidence" or "a preponderance of evidence" indicating that they had not discriminated against the petitioner?

II

Whether the Court of Appeals erred, when it denied the petition for rehearing of the respondents' Motion for Summary Affirmance of the September 30, 1987 Order denying petitioner's Motion for Judgment by Default where the respondents' responses to interrogatories and request for production and inspection were deemed failures to answer under Fed.R. Civ.P. 37; where neither Fed.R.Civ.P. 26 nor rule 46, exempts, from discovery, the information sought from the respondents; where the bar examiners' answers were neither given by them nor taken under oath as required by law; and where the respondents had in their posse-

ession, the information sought?

III

Whether the Court of Appeals erred when it denied the petition for rehearing of the petitioner's Motion for Summary reversal of the January 16, 1985 Order dismissing, in their individual capacities, from money damages, the respondents who were sued in both their individual and official capacities; and where Fed.R.Civ.P. 25(d) provides for the dismissal or substitution of persons sued only in their official capacity?

IV

Whether the Court of Appeals erred, when it denied the petition for rehearing of the respondents' Motion for Summary Affirmance of the January 17, 1984 Order granting respondents' underlying Motion for Protective Order, when Harlow v. Fitzgerald cited by the respondents as controlling, requires immunity before a person is exempt from certain actions and when there was no good cause

shown for not responding to the Interrogatories?

PARTIES HEREIN

Evanna Powell	Petitioner
Anthony Nigro	Respondent
Jeanne L. Dobres	Respondent
William C. Gardner	Respondent
James A. Hourihan	Respondent
Issie L. Jenkins	Respondent
Allan Kay	Respondent
Laidler B. Mackall	Respondent
Richard Marsh	Respondent
Lee A. Satterfield	Respondent
Charles J. Steele	Respondent
Jacob A. Stein	Respondent
George Windsor	Respondent

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EVANNA POWELL,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Evanna Powell, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

JURISDICTION OF THIS COURT

The date of the judgment to be reviewed was entered by the United States Court of Appeals for the District of Columbia Circuit on August 25, 1988. (Appendix A, A-1).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and U.S. CONST. art. III, § 2, cl. 2.

CONSTITUTIONAL AMENDMENT STATUTES AND RULES INVOLVED

U.S. CONST. amend. V (Appendix S, A-59)

42 U.S.C. 1983(1976 & Supp. 1980)(A-59 & 60)

Fed.R.Civ.P. 25(d) p. 20

Fed.R.Civ.P. 37(a)(3)(Appendix Y, A-62)

Fed.R.Civ.P. 37(b)(2)(A-C) p. 18

D.C. Code 11-2501(1981)(Appendix V, A-60)

Rule 46(b)(6)(Appendix W, A-60)

Rule 46(b)(8)(Appendix X, A-61)

STATEMENT OF CASE

I. BASIS OF FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

In the United States District Court for the District of Columbia, the petitioner, Black, instituted suit for violation of 42 U.S.C. 1983 and denial of due process and equal protection in violation of the Fifth Amendment of the United States Constitution in the administration, grading and review of the District of Columbia Bar examination.

Jurisdiction in the district court is based on 28 U.S.C. 1331(a), 28 U.S.C. 1343 and L.R. 3-4(a)2 and L.R. 3-4(a)(3)(Local Rules of the Federal District Court).

After availing herself, several times, of the paper review procedure of the Committee on Admissions of the District of Columbia Bar, and never being given reasons why her answers were wrong, and therefore why she was unsuccessful, when her answers were supported by case law, statutes, regulations, ordinances and/or logic, the petitioner first instituted, in the federal district court, a federal Freedom of Information suit, Powell v. Nigro, No. 79-3208 (D.D.C. 1-25-80); No. 80-1147(Dst.Ct. App. D.C. 5-20-80); No. 79-2057 (U.S. Sup. Ct. 12-1-80), to obtain the information necessary to determine the reasons why she was unsuccessful.

The Federal District Court dismissed the action on the ground of failure to state a

claim upon which relief could be granted, and not on the ground of lack of subject matter jurisdiction. (Appendix O, A-55) The Court of Appeals affirmed the district court's decision. (Appendix P, A-56) The Supreme Court denied the Petition for Writ of Certiorari. (Appendix Q, A-57)

When the Freedom of Information suit did not provide the petitioner with the information to determine why she was unsuccessful, the petitioner instituted, the present action in federal district court.

II. MATERIAL FACTS RELATING TO THE QUESTIONS PRESENTED

On November 28, 1983, the petitioner served Interrogatories on all respondents, and on September 30, 1985, served on the secretary, a Request for Production and Inspection. After several extensions to complete discovery, on February 29, 1984, the secretary answered with evasive, incomplete

and inaccurate answers. The Interrogatories to the bar examiners were never answered by the examiners: The examiners' attorney, the wrong person to respond, answered some questions. Moreover, the responses were not under oath.

Because the secretary's responses were evasive, incomplete and inaccurate and because he did not produce documents requested or permit inspection,and because the bar examiners did not respond to Interrogatories, the petitioner, on January 29, 1985, based on Fed.R.Civ.P 37(b) and case law, filed a Motion for Judgment by Default or Alternatively a Motion to Prohibit Use, By Or On Behalf of the Respondents, Information Sought but not Produced. On December 13, 1984, the respondents filed an Opposition. On September 30, 1987, the District Court issued an order denying the Motion.

On December 30, 1983, the bar examiners,

citing Harlow v. Fitzgerald, 457 U.S. 800 (1980), filed a Motion for a Protective Order relieving them from responding to the Interrogatories. On January 4, 1984, the petitioner filed an Opposition, stating that because the respondents were not entitled to immunity as Harlow required, then the respondents were not entitled to a protective order.

On February 29, 1984, the respondents filed a Motion to Substitute Parties. By Order dated January 16, 1985, the examiners were dismissed in their individual capacities from the demand for money damages. On January 29, 1985, the petitioner filed a Motion to Alter Judgment relating to the dismissal of the bar examiners relying on Fed. R.Civ.P. 25(d) which permits only substitution or dismissal of persons sued in their official capacity, and on case law--Ex Parte La Prade and ExParte Young to name two cases--which hold officials liable for exceeding

their authority.

On September 15, 1985, the respondents filed a Motion for Summary Judgment regarding there being no discrimination as stated in the complaint. On October 28, 1985, the petitioner filed an Opposition stating there were genuine issues of material facts in dispute. The petitioner submitted to the respondents' attorney, pursuant to the Court's request, statistical and other data supporting the petitioner's claims and indicating the respondents had discriminated against the petitioner. On September 30, 1987, the court issued an order granting the Motion for Summary Judgment.

On October 29, 1987, the petitioner filed with the District Court a Notice of Appeal of the September 30, 1987 Order denying petitioner's Motion for Judgment by Default; the September 30, 1987 Order granting the respondents' Motion for Summary Judgment; part of the January 16, 1985

Order dismissing the bar examiners in their individual capacities from the demand for money damages and part of the January 17, 1984 Order granting the bar examiners' Motion for Protective Order regarding Interrogatories.

In the Court of Appeals for the District of Columbia, on December 18, 1987, the respondents filed a Motion for Summary Affirmance of the Orders stated in the Notice of Appeal. On December 30, 1987, the petitioner filed an Opposition.

On December 18,1987, the petitioner filed a Motion for Summary Reversal of the January 16, 1985 Order dismissing the bar examiners from money damages and a Motion for Summary Reversal of the September 30, 1987 Order granting the respondents' Motion for Summary Judgment.

On June 6, 1988, the Court of Appeals issued an Order granting the Motion for Summary Affirmance and denying the Motions for

Summary Reversal. The Court, in the Order, directed the clerk to withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing.

On June 16, 1988, the petitioner notified the Court of her intention not to petition for a rehearing.

After the United States Supreme Court, on June 29, 1988, rendered its decision in Watson v. Ft. Worth, __ U.S. __,(No. 86-6139), the petitioner on July 6, 1988, filed with the Court of Appeals, Notice of the Watson decision requesting the court to decide the petitioner's case within the disparate impact analysis as instructed in Watson or remand the case with instructions.

ARGUMENT

I

The Court of Appeals has sanctioned such a departure by the district court and such a departure from its own decision as to call for an exercise of this Court's power

of supervision.

The Court of Appeals decided petitioner's case in conflict with Watson v. Ft. Worth Bank & Trust, __U.S.__,(6-29-88) (No. 86-6139), which holds the desparate impact analysis is applicable to discretionary and subjective employment practices. Moreover, Watson ruled that where a party has made a prima facie showing of discrimination, the opposing party must come forth with evidence indicating why the actions complained of were not discriminatory.

The Court of Appeals decided petitioner's case in conflict with its own decision in Hopkins v. Price Waterhouse, 825 F.2d 458 (8-4-87), 618 F.Supp. 1109(9-20-85), a sexual discrimination case which holds, in relevant part, that the plaintiff's showing she was treated less favorable than male candidates because of her sex, was sufficient to establish a discriminatory motive, and, in the absence of the defendant's demonstrating

by "clear and convincing evidence" that impermissible bias was not the determinative factor in denial of the plaintiff's partnership application, plaintiff's showing was sufficient for a finding of discrimination by the defendant.

Petitioner, who is Black, filed a Complaint alleging violation of 42 U.S.C. 1983 and denial of due process and equal protection in violation of the 5th Amendment of the United States Constitution in connection with the administering, grading and review of the District of Columbia bar examination.

The petitioner submitted statistical data and other evidence indicating the percentage of Blacks to whites passing the bar examination was less than 1% for Blacks and more than 96% for whites. (AppendixII, A-89) The pattern of disproportionate not passing to passing persisted throughout the bar examination times in question, i.e., 1976 -1981.

The petitioner submitted data indicating that the examination numbers assigned unsuccessful Blacks fell within a certain range and were predetermined as numbers for unsuccessful Blacks. (AppendixHH, A-88) The petitioner presented statistical and other evidence indicating there was no ascertainable standard , in fact or in application, for grading bar examinations. (Appendices JJ, A-90 & GG, A-87 .)

Rule 46 states a grade of 70 shall be passing and that the equipercentile method shall be used. (Appendix X, A-61) The chairman of the Committee on Admissions said a 140 (raw score) on the multistate examination was passing and if an examinee made 140 or above, his essay answers were not read. (AppendixEE, A-84) Testing Director National Conference of Bar Examiners (NCBE) stated three states used 140 on multistate as a passing score without reading essay answers. (AppendixFF, A-86)

The petitioner had a raw score of 149 on the multistate bar examination but did not pass. (AppendixGG, A-87) An equipercentile score of 66.3 has a raw score of 149, (AppendixGG, A-87) yet, the petitioner did not pass.

The petitioner submitted information indicating that from the names, addresses, parents' names, schools attended, background checks, and from examinees being repeaters, the respondents knew the race of applicants, and used this and other information, to discriminate against the petitioner and other Blacks.

The petitioner contends that from the response to bar application question 5, asking about the number of times the bar has been taken and reasons for each failure, the respondents predetermined unsuccessful Blacks.

The petitioner states, based on the statistical and other evidence submitted, she made a prima facie showing of discrimi-

nation under both Watson and Hopkins. Under Watson, the desparate impact analysis should have been applied to the petitioner's case and under both Watson and Hopkins, the respondents should have come forth with evidence indicating why the actions complained of, were not discriminatory.

A party cannot come forth with any kind of evidence and consider the requirement met.

The evidentiary standards of proof, in civil matters, are "clear and convincing evidence" or "a preponderance of the evidence."

In Hopkins, the Court of Appeals ruled "clear and convincing evidence" is the standard for overcoming a prima facie showing of discrimination. Such evidence the respondents did not present.

While Watson does not state an evidentiary standard, its standard must be one of the two-mentioned standards for civil cases. Therefore, under Watson the respondents could not have complied with either standard, since

under case law and Fed.R.Civ.P. 37 (discussed hereinafter under part II of the Argument) their evasive, incomplete and inaccurate responses were failures to answer or were no answers.

II

The decision of the District Court and the Court of Appeals for the District of Columbia Circuit is in conflict with decisions of the First, Second, Fourth and Seventh Circuits regarding responding to interrogatories and request for production and inspection.

On November 28, 1983, the petitioner served her first set of Interrogatories on the respondents, and according to Fed.R.Civ. P. 33, the respondents were to respond within 30 days. On February 29, 1984, the secretary answered the petitioner's First Interrogatories.

By Orders dated January 9, 1984, January 31, 1984, January 16, 1985 and in court around January 16, 1984, the Court extended

to January 18, 1984, February 22, 1984, for 20 days and to January 23, 1984, respectively, the time for the respondents to respond to Interrogatories. By Order dated November 19, 1985, the Court extended, by 40 days, the time for both sides to complete discovery.

When the secretary finally responded to the First Interrogatories on February 22, 1984, his answers were either evasive, incomplete, inaccurate and his objections were without a statutory basis for exemption from discovery.

The bar examiners never answered the Interrogatories addressed to them. The attorney, on October 28, 1985, answered Interrogatories addressed to the bar examiners, and responded to the Request, addressed to the secretary, for Production and Inspection. (Appendices CC & BB)

The First Circuit in U.S. for benefit of General Electric Supply Corp. v. W.E. O'Neil Const. Co., 1 F.R.D. 529 (1940)

ruled,

> The proper remedy for failure to answer interrogatories is a motion for judgment by default, and not a motion to require answers to interrogatories. (emphasis added)

The District of Columbia Circuit stated in its September 30, 1987 Order relating to the default judgment, the remedy for the respondents responses [which were evasive, incomplete, inaccurate and without statutory basis for exemption] is a Motion Compelling an Answer or Compelling Inspection.

An order is an instruction or command issued by the court, to do or refrain from doing something. Since the Court issued five (5) orders commanding the respondents to respond to the interrogatories, within a certain time, for the petitioner to file a Motion to Compel an Answer or Inspection, appears unwarranted.

The remedies for failure to respond to Interrogatories or Requests for Production

and Inspection, in addition to a Motion to Compel which appears inappropriate under the facts herein, are as follows:

Fed.R.Civ.P. 37(b)(2)(A-D):

> A. ...Matters regarding the Order for failure to respond, and designated facts shall be taken to be established for the ... claim of the party obtaining the order;
>
> B. ...Refusing to allow the disobedient party to support or oppose designated claims or defenses...;
>
> C. ...Dismissing the action... or rendering a judgment by default...;(emphasis added)
>
> D. ...Treating as contempt of court the failure to obey.

The Second and Fourth Circuits in Jones v. Goldstein, 41 F.R.D. 271(1966) and Cabales v. U.S., 51 F.R.D. 498, aff'd 447 F.2d 1358(1970) require that interrogatories be answered by the persons to whom the interrogatories are addressed.

The District Circuit does not require interrogatories be answered by the bar examiners to whom they were address or the

Request for Production of Documents and Request for Inspection be responded to by the secretary. (Appendices CC, A-79 & BB, A-78.)

The Seventh Circuit in U.S. v. 58.16 Acres of Land, 66 F.R.D. 570(1975) ruled that interrogatories must be answered under oath. Neither the answers of the bar examiners nor the response of the secretary for production and inspection were answered under oath.

III

On the matter of substitution of parties, the federal courts in the District have rendered a decision which conflicts with decisions of this Court, and the Court of Appeals has so sanctioned the departure by the lower court, as to call for an exercise of this Court's power of supervision.

The petitioner sued the respondents individually and in their official capacities as the Committee on Admissions of the District of Columbia Bar.

By Order dated January 16, 1985, the Court dismissed the respondents as parties to the demand for money damages relating to allegations in ¶¶ 10a-10b, 13, 15-16, 17a-18, 20a-20b of the Complaint. The Order also substituted the Committee on Admissions as the party defendant to the equitable claims. (Appendix I, A-43)

Under Fed.R.Civ.P. 25, substitution of parties is authorized in only four (4) situations: death, incompetency, transfer of interst (any parties) and death or separation from office of a public officer.

Rule 25(d) states,

> When a public officer is a party to an action in his official capacity, and during its pendency dies, resigns, or otherwise ceases to hold office...his successor is automatically substituted as a party. (emphasis added)

Rule 25(d) does not authorize the substitution of persons sued in their individual capacity. Rule 25(d) only authorizes substitution of persons sued in their

official capacity.

The petitioner finds substitution of the present Committee for the predecessors sued in their official capacity to comport with the statute.

The respondents, sued in their individual capacities, should not be substituted by someone in their individual capacity because the named respondents are the individuals who committed the wrongs complained of. They are the real parties in interest under Fed.R.Civ.P. 17a and in whose absence, complete relief cannot be granted. Fed.R. Civ.P. 19. Because the petitioner's right to protect her interest will be seriously impaired by the substitution of the respondents in their individual capacities, rule 19 requires that the respondents not be substituted in their individual capacity.

Ex Parte La Prade, 289 U.S. 458 (1933) decided under the predecessor to rule 25(d), but which still holds true in this respect

states, substitution of officials, does not authorize the imposition of liability or restraint upon the successor on account of anything done or threatened by the predecessor individually.

Wrongs committed or threatened by an officer under an unconstitutional statute do not constitute ground for an injunction against his successor; nor does a declaration of the statute that he shall bring penalty suits to enforce it, since he might hold it unconstitutional and deem himself justified by his official oath in refraining. ExParte La Prade, at 458.

Ex Parte Young, 28 S.Ct. 441 (1908) in addressing the liability of a person for his own acts, states,

> If the Act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is

> subject in his person to the consequences of his individual conduct.

The principle stated in Ex Parte Young has been affirmed in Hopkins v. Clemson College, 221 U.S. 636, 642, et seq. Truax v. Raich, 239 U.S. 33, 37. Terrace v. Thompson, 263 U.S. 197, 214, Sterling v. Constantin, 287 U.S. 378, 393.

Other than substitution of parties, the other theory under which the respondents could possibly avoid liability relating to the demand for money damages is by way of immunity.

There are two types of immunity: absolute and qualified (limited).

Simply because a person is a judge, officer of the court or otherwise associated with carrying out the duties of the court, does not automatically mean the person is entitled to immunity.

The prerequisite to determining whether

any immunity should be accorded an official, is a characterization of the action complained of, as investigative, administrative or non-judicial on the one hand, or as judicial on the other hand.

Stump v. Sparkman, 435 U.S. 349(1978); Pierson v. Ray, 386 U.S. 547 (1967) and Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872) hold that a judge cannot be liable in civil actions for their judicial acts which may be in excess of their jurisdiction, malicious or corrupt. None of the cases holds a judge is not liable for acts which violate the Constitution. The excess jurisdiction referred to in these cases is excess of subjectmatter jurisdiction, not excesses of all jurisdictions, and particularly not actions in excess of a judge's Constitutional jurisdiction: the Judges in every State shall be bound by the Constitution, and the Laws, of the

United States which shall be made in pursuance thereof. U.S. Const. art. VI, cl. 2

The determination that there is absolute immunity in Stump (a judge's approval of a petition), in Pierson (a judge's dismissal of an action) and in Bradley (a judge's removal of an attorney from the bar roll), was based on the actions being actions properly performable by judges.

Harlow v. Fitzgerald, 457 U.S. 800 (1982) holds, government officials whose special functions or constitutional status require protection from suits for damages are entitled to absolute immunity from personal liability for unconstitutional conduct. However, such officials bear the burden of showing that public policy requires an exemption of that scope.

The fact that bar examiners and the secretary are not constitutional creatures

as are judges, the examiners and secretary are not automatically entitled to all privileges and immunities to which judges are entitled.

Where the action complained of is judicial and within the Constitutional and subject matter jurisdiction of the official, absolute immunity from damages should be accorded as in Stump, Pierson and Bradley.

Where the action is not judicial, then qualified immunity or no immunity may be accorded, depending on the facts.

Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908), sets forth the criteria for a judicial inquiry. If the court is called upon to investigate, declare and enforce liabilities as they stood on present or past facts and under laws supposed already to exist, the court has conducted a judicial inquiry.

This Court in District of Columbia

Court of Appeals v. Feldman & Hickey, 460 U.S. 462 (1983), citing Prentis ruled that the waiver petitions asserted a claim of a present right to admission to the bar, and therefore the court's action was judicial.

The petitioner states the Committee's action in her case was not judicial because she never petitioned the D.C. Court of Appeals or the Committee regarding a claim of a present right or regarding a rule. Petitioner only asked the Committee to explain why her answers were not accorded enough credit for her to pass the examination. Neither the Court of Appeals nor the Committee was requested or required to conduct, in the petitioner's case, a judicial inquiry in which the court was called upon to investigate, declare, and enforce liabilities as they stood on present or past facts and under laws supposed already to

exist.

Where, as in the petitioner's case, the petitioner did not raise before the Committee or Court of Appeals, and where neither the Committee nor Court of Appeals was asked to, nor did either decide, a claim of a present right to admission to the bar, but where the petitioner took and reviewed a test which the Committee graded and reviewed, the Committee was not involved in a judicial proceeding, but was only involved in a ministerial act performed by virtue of judicial power.

The actions of the bar examiners and secretary in composing, grading and administering the bar examinations in question do not comport with a "judicial inquiry" or "judicial proceeding" as enunciated by this Court in Feldman and Prentis.

The United States Court of Appeals in Simons v. Bellinger, 643 F.2d 777, and the

Supreme Court in Imbler v. Pachtman, 424 U.S. 430 (1976) state that whether a proceeding is judicial or not depends on whether the action of the quasi-judicial body has moved from the investigative or non-judicial stage to the advocacy stage. If the action has so moved, the official's action is at the point where it is intimately associated with the judicial process and at such point, the official is entitled to absolute immunity.

It is the petitioner's position that the actions of the Committee in grading and administering examinations were non-advocatory activities. At no point at the Committee level, did the examiners' or secretary's activities rise to the advocatory level, and because they did not so rise, under Simons and Imbler, the respondents are not entitled to absolute immunity.

Simons, at 777, citing Briggs v.

v. Goodwin, 186 U.S. App. D.C. 179, 190 (1977), cert. denied 437 U.S. 904 (1978) states,

> This Court [U.S. Court of Appeals] has recognized that public policy dictates that absolute immunity is not appropriate for prosecutors when they are 'engaged in essentially investigative as opposed to advocatory activities.' (emphasis added)

Simons, at 778, citing Butz v. Economou, 438 U.S. 478 (1978) states,

> Official who seek absolute immunity exemptions from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.

In the instant case, public policy requires no exemption.

Where officials are not entitled to absolute immunity, Harlow, at 815 states, there is the possibility of a lesser immunity.

> [Q]ualified immunity would be defeated if an official 'knew or reasonably should have known'

> that the action he took within his sphere of responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury....

All the respondents are lawyers, who know, and have taken an oath to uphold the Constitution. They knew and know that the grading method and other policies relating to admission, as applied to Blacks, violated the Constitution and § 1983.

Because the respondents knew and know their actions were violative of the petitioner's Constitutional rights, the respondents are not entitled to qualified immunity.

The exercise of discretion by a judge, bar examiner or secretary, must be within the confines of the Constitution, and where the exercise exceeds the Constitutional mandate, the official should be liable.

IV

The decision of the District Circuit to grant the protective order is so inconsistent with the decision of this Court as to call for an exercise of this Court's power of supervision.

The respondents requested the District Court, pursuant to Fed.R.Civ.P. 26(c) to enter a protective order relieving the bar examiners from responding to interrogatories on grounds of the interrogatories being unduly burdensome, that the information sought was not at their disposal, and that an identical copy had been propounded to the secretary.

The protective order should not have been granted because the interrogatories were not unduly burdensome, because the bar examiners did have the information at their disposal and because the interrogatories addressed to them were not identical to the secretary's interrogatories.(Appendix CC,A-79)

While the interrogatories asked for information relating to bar examinations given from February 1976 to February 1981, an answer for one year perhaps would have been repeated for other years since procedures and information would not have changed from year to year.

In summary, the Interrogatories to the bar examiners sought information about the extent of their legal education and the institutions of matriculation; their professional reputation in the community; whether they were experts in the subject-matter area of their questions; the cases and briefs in which they were involved; the means by which they received the answers they graded; the place where they graded the answers; whether some or all answers were received and graded; the means and time, after grading, the answers and grades were returned to the secretary; the criteria used to grade answers;

and the amount of time devoted, between receipt of answers and completion of grading of answers, to his or her personal life.

The interrogatories to the secretary were distinctly different from the interrogatories to the bar examiners. In summary, the interrogatories to the secretary sought information relating to test validation; statistical data on the pass-fail rate in general and by race; the methodology of grading under the equipercentile method; the places where examinations were graded; the method of delivery and return (if not at the Court); whether some or all examinations were delivered to examiners; the criteria for selecting bar examiners; examination identification numbers of Blacks and whites who failed; the number of Black and whites who passed; the law schools of successful and unsuccessful Blacks and whites; the number of Blacks

and whites who did and did not list a parent or relative as a lawyer; and the number of Blacks and whites who were repeaters.(Appendices Z, A-63 & AA, A-73)

Inasmuch as the bar examiners' interrogatories related to things they had done, the information should not only have been at their disposal but also should have been in their minds.

In addition to rule 26(c), the respondents cited and relied on Harlow v. Fitzgerald, 457 U.S. 800 (1982) as requiring a a protective order, but nowhere does Harlow discuss a protective order or the issuance of a protective order.

Harlow,at 812, 813 and 815 does discuss immunity. However, it is immunity for actions performed by Presidential aides in their official capacities.

Harlow is not applicable to the issuance of a protective order in the instant case on the ground of immunity; neither absolute

immunity nor qualified immunity.

Harlow states absolute immunity requires that the aide show the responsibilities of his office embrace sensitive areas such as national security or foreign policy and that the aide was discharging the protected function when preforming the act for which liability is asserted.

The admission of persons to the bar involves neither national security, foreign policy nor any matter of a sensitive or secret nature, but involves matters of a public nature which directly and immediately affect all citizens daily.

Harlow states qualified immunity will be defeated if an official "knew or reasonably should have known that the action he took within the sphere of official responsibility would violate constitutional rights of the plaintiff...." The respondents, who are lawyers, knew or should have known their actions relating to the bar examinations

would deprive the petitioner of a license to practice law in violation of the Constitution and in violation of § 1983.

Under Harlow, Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978) and Wood v. Strickland, 420 U.S. 308 (1975), the respondents do not qualify for immunity. Under said cases, the respondents are not entitled to a protective order.

V

In view of the foregoing arguments, the petitioner respectfully requests the Court to issue a writ of certiorari to review the August 25, 1988 judgment of the United States Court of Appeals for the District of Columbia Circuit.

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AFFIDAVIT OF SERVICE

CITY OF: Washington

STATE OF: District of Columbia

I, Evanna Powell, being first duly sworn, state that three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit including Appendix were mailed, with prepaid postage, this , day of , 198 , to

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Subscribed and sworn to before me this day of , 198 .

Notary Public